

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



Legal Counsel Division

December 27, 2004

Mr. Robert Vinson Brannum
Commissioner-Elect ANC 5C04
158 Adams Street, N.W.
Washington, D.C. 20004

Re: Creating a Constituency Fund, Commissioner Fund Raising, Creation of Nonprofit Organizations, Interpretation of Statutory Definitions, Notice Requirements to ANCs

Dear Commissioner-Elect Brannum:

This responds to your letter of November 30, 2004, to Attorney General Robert J. Spagnoletti, Office of the Attorney General for the District of Columbia. You ask for legal advice on a series of topics as you prepare to commence your term as an ANC Commissioner. We address each submitted question separately below.

1. Is an ANC Commissioner able to establish a constituency fund for his/her SMD [Single Member District]?

Although you do not define or explain the term “constituency fund,” our answer must be no. The law governing ANCs is contained in the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.01 *et seq.* (2001 and 2004 Supp.)(collectively, the ANC Act). There is no provision in the ANC Act for an SMD Commissioner to establish a constituency fund, or any other fund. Only the commissions are authorized to establish monetary funds and those funds are limited to two types: a “checking or negotiable order of withdrawal account” (D.C. Official Code § 1-309.13(b)(3)(2004 Supp.)) and a petty cash fund (D.C. Official Code § 1-309.13(h)). Where, as here, no specific authorization is statutorily expressed, we apply the doctrine *Expressio Unius Est Exclusio Alterius*, meaning that the mention of one thing necessarily excludes another. In this instance we interpret this to mean that the Council intended to prohibit ANCs (and their Commissioners) from establishing any monetary funds or accounts other than those expressly permitted under the ANC Act.

2. Can an ANC Commissioner raise funds for a non-profit organization?

Again, your question is incomplete. You do not state whether the contemplated fundraising would be conducted by an ANC Commissioner in that Commissioner's official capacity or as a private citizen, nor do you specify the type of non-profit organization that would be the beneficiary of such efforts. As a matter of practice we do not answer such broadly expressed and incomplete queries, primarily because the answers are dependent upon varying factors. For instance, ANC Commissioners acting in their official capacity certainly would not be permitted to raise funds for any entity including the ANC itself.¹ However, it is less clear to what extent an ANC Commissioner, acting as a private citizen, may engage in fundraising activities for various entities. This would depend upon such factors as the type of fundraising activity contemplated, whether proper precautions were in place to avoid any appearance that the Commissioner was acting in his/her official capacity, and whether there might be some conflict between the beneficiary entity and the Commissioner's official duties as an elected official. The fact of non-profit status is not, by itself, a determinative factor.

If there is a specific situation you wish us to consider, please so advise and we will attempt to provide you with appropriate guidance.

3. Can an ANC Commissioner establish a non-profit organization to support community service activities in his/her SMD?

There is no authority that permits an ANC Commissioner to establish a non-profit organization, and such an activity is therefore prohibited. The law is similarly silent, however, as to whether an ANC Commissioner, acting as a private citizen, might start a non-profit organization. Again, this would raise multiple issues concerning the type of outside activity in which government officers may engage. Considering that this particular non-profit would "support community service activities" in the Commissioner's very own SMD, we could easily envision conflicts that might arise given the Commissioner's obligations to the SMD. Moreover, the non-profit's focus on the SMD would make it very difficult to separate, in the public's eye, official duties of the Commissioner and the activities of the organization. This would be a very different situation from a non-profit organization with a national or even city-wide focus, where there would be a decreased opportunity for the Commissioner's activities to overlap with those of the non-profit.

In any event, we recommend against establishing the type of nonprofit you propose above. The risks of exposure to you, both ethically and in a civil context, are likely to be significant.

4. Are actions of an ANC Commissioner limited only to those permitted under law, rather than those not specifically prohibited?

This, too, is an overly-broad query. The ANC Act contains both mandatory language (what an ANC must do) as well as directory language (what an ANC may do). Where the statute is silent, as discussed above, we interpret the ANC law under the statutory construction doctrine *Expressio Unius Est Exclusio Alterius*, which, applied here,

¹ Section 13(l) of the ANC Act (D.C. Official Code §1-309.10(l) (2004 Supp.)) prohibits commissions from soliciting funds unless specifically authorized to do so by the Council.

precludes a Commissioner from doing that which is not specifically authorized. It must also be noted that while the ANC Act makes many references to what a Commission can or must do, it is almost silent on what individual Commissioners may do, except to serve on the Commission.

Notwithstanding, there may be instances where a proposed activity, though not expressly permitted, could nonetheless be permissible as necessary or incidental to an otherwise permitted activity. As a result, we prefer to review these types of queries on a case by case basis.

5. Since the position of ANC Commissioner is non-salaried, are expenses incurred while in the performance of official duties tax deductible?

This is not the type of question we are able to answer. We recommend that you consult with a competent tax advisor.

6. Does D.C. Law 12-144 (45 DCR 6941)[Act 12-355, 45 DCR 3747] require advance notification to Advisory Neighborhood Commissions for comments?

You are referring here to the National Capital Revitalization Corporation Act of 1998, effective September 11, 1998, D.C. Law 12-144, D.C. Official Code § 2-1219.01 *et seq.* (2004 Supp.) (Revitalization Act), which created the National Capital Revitalization Corporation. Although the Revitalization Act itself does not state under what circumstances or in what manner notice to ANCs might be required, it nonetheless requires compliance with the notice-to-ANCs provisions of the ANC Act, D.C. Official Code § 1-309.10(d) (2004 Supp.). *See* D.C. Official Code § 2-1219.07(f) (2004 Supp.). Under that section, advance notice to ANCs of actions taken by the National Capital Revitalization Corporation (or any of its subsidiaries) may be required, depending upon the type of conduct in question.

Sincerely,

ROBERT J. SPAGNOLETTI
Attorney General

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RJS/dps

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